

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Jurisdictional Separations Reform and)	CC Docket No. 80-286
Referral to the Federal-State Joint Board)	

REPLY COMMENTS OF GENERAL COMMUNICATION, INC.

General Communication, Inc. ("GCI"), through its attorneys, hereby replies to Comments filed by Alaska Communications Systems, Inc. regarding the Glide Path Paper submitted by the state members of the Federal-State Joint Board on Jurisdictional Separations.¹

In the Glide Path Paper, the Joint Board articulates various jurisdictional alternatives aimed at re-examining and re-defining the jurisdictional division between state and federal authority over telecommunications services.² In its Comments, ACS offers two alternative proposals. First, ACS endorses shifting additional, unspecified costs to the interstate jurisdiction. ACS plainly seeks regulatory imprimatur on its unilateral, self-help, election to shift the costs of ISP traffic to the interstate jurisdiction.³ This ACS action is designed simply to

¹ See "Glide Path" Paper from the State Members of the Federal-State Joint Board on Separations, CC Docket No. 80-286 (filed Dec. 17, 2001) ("Glide Path Paper"). See also Common Carrier Bureau Seeks Comments on "Glide Path" Policy Paper Filed by the State Members of the Federal-State Joint Board on Jurisdictional Separations, Public Notice, CC Docket No. 80-286, DA 01-2973 (rel. Dec. 20, 2001).

² See Glide Path Paper at 2.

³ See generally General Communication, Inc. v. Alaska Communications Systems Holdings, Inc., Memorandum Opinion and Order, 16 FCC Rcd 2834 (2001), appeal docketed sub nom. ACS of Anchorage, Inc. v. FCC, No. 01-1059 (D.C. Cir. filed Feb. 7, 2001); Investigation of Tariffs Filed by ACS of Anchorage, Inc., and the National Exchange Carrier Association, Order Designating Issues for Investigation, CC Docket No. 02-36, DA 02-371 (CPD rel. Feb. 15, 2002).

impose costs on captive interexchange carrier (“IXC”) customers that are not caused by those customers and poses no solution to the complex matters identified by the Joint Board in its Glide Path Paper. ACS further proposes, even beyond jurisdictional separations issues, the elimination of rate regulation for carriers facing “effective competition.” For the reasons described below, GCI opposes adoption of either ACS proposal.

I. ACS PROPOSES TO ASSIGN LOOP AND TRAFFIC SENSITIVE COSTS TO THE INTERSTATE JURISDICTION TO AVOID COMPETITIVE PRESSURES IN THE INTRASTATE JURISDICTION

ACS urges the Commission to “take responsibility for additional costs” through allocation of additional loop costs and ISP costs to the interstate jurisdiction.⁴ At the same time, ACS fails to identify with specificity how any such costs are to be quantified. Though it claims in general a displacement of “hundreds of millions of dollars” (at 5) GCI expects that the figure under ACS’ proposals would be much higher. According to ACS, the jurisdictional separations rules “hamper the development of efficient competition and create arbitrage opportunities.”⁵ Yet, as ACS’ pleading and past actions reveal, it seeks to shift costs to the interstate jurisdiction to “cover” excessive interstate earnings and avoid its refund obligation. This is no basis for the Joint Board to make serious policy assessments.

As a initial matter, ACS provides no support for its proposals to shift costs. For example, ACS proposes that the Joint Board change the loop cost allocation from the current 25/75 mix. According to ACS, “the local loop has been used to provide increasing amounts of interstate, interexchange services, dial-up connections to the Internet, and DSL services.”⁶ Yet, ACS offers

⁴ ACS Comments at 10.

⁵ Id. at 7.

⁶ Id. at 10.

no estimate of the “increasing amounts” represented by these services. Nor does ACS make any attempt to quantify - or even explain how it would - estimate the jurisdictional split represented by all services offered using the local loop. Indeed, it apparently does not suit ACS’ purposes to also consider that many users of high speed cable modem, wireless and satellite access services are migrating information services off the local loop, so that even if an increase in usage had been quantified at some time, that usage pattern is likely changing again. But since ACS made no attempt to support its claim, this matter cannot be meaningfully assessed.

The same can be said for ACS’ request to shift all the costs of ISP traffic to the interstate jurisdiction. ACS urges the Commission to “take jurisdictional responsibility” for the switching costs of ISP-bound traffic. Far from “brazenly shirking its responsibility” the Commission has consistently held that ISP traffic is “jurisdictionally mixed” having both intrastate and interstate components.⁷ Because this traffic is mixed and the revenues for ISP-bound traffic continue to be collected in the intrastate jurisdiction pursuant to the ESP exemption, the Commission noted in its Separations Freeze Order that “assigning ISP traffic sensitive costs to the intrastate jurisdiction is a ‘reasonable measure’ based on sound policy choices.”⁸ ACS attempts to avoid reconciling the mixed nature of this traffic with its proposal to shift all cost to the interstate jurisdiction, by citing “the unique nature of Alaska’s location and traffic mix.”⁹ Again, ACS provides no support for its claim.

⁷ Southwest Bell Tel. Co. v. FCC, 153 F.3d 543, 541-42 (8th Cir. 1998) (noting with approval FCC finding that ISP traffic is “jurisdictionally mixed”); People of State of California v. FCC, 905 F.2d 1217, 1244 (9th Cir. 1990). See also General Communication, Inc. v. Alaska Communications Systems Holdings, Inc., 16 FCC Rcd 2834.

⁸ Jurisdictional Separations and Referral to the Federal-State Joint Board, Report and Order, 16 FCC Rcd 11382, 11403 (¶ 40) (2001) (“Separations Freeze Order”).

⁹ ACS Comments at 2.

ACS' failure to do so is not surprising give the Commission's recent consideration of this issue. In the Separations Freeze Order, the Commission declined to adopt a Joint Board proposal to reduce the DEM factor as a "short-term way to shift some [ISP-bound traffic] costs to the interstate jurisdiction."¹⁰ In doing so, the Commission noted:

Despite our efforts to focus the record on this issue, the parties have not presented reliable evidence that would allow us to quantify with any reasonable certainty the portion of local usage that can be attributed to Internet usage, and thus establish a reasonable amount of DEM reduction that should be applied. No party has produced specific documentation of increased investment outlays, local rate increases, or requests for relief from carriers that have stemmed from sharp increases in local calling patterns due to increased Internet usage. We have no reliable data, therefore, upon which to set any reasonable local DEM reduction on an across-the-board nationwide basis in order to compensate for any effects that Internet usage may have had on jurisdictional allocations or consumers.¹¹

Thus, the Commission declined to reduce the local DEM factor but stated that when the Commission and the Joint Board "seek comment on the impact of the freeze after the freeze has been in effect for some time, we will seek specific comment on the status of the ISP-bound traffic issue, and the impact of the freeze on this situation."¹² The Commission further noted that "[I]f we are in the future presented with evidence that demonstrates with greater precision the impact of increased Internet usage on consumers or carriers, we can revisit this issue."¹³ ACS has not "demonstrate[d] with greater precision" any aspect of his issue, and certainly has not advanced the Joint Board's consideration with the absence of any evidence whatsoever. Plainly, adoption of ACS' proposed "interim step" would not advance the Joint Board's goal of

¹⁰ Separations Freeze Order, 16 FCC Rcd at 11402.

¹¹ Id.

¹² Id. at 11403 (¶ 42) (emphasis added).

¹³ Id.

establishing reasonable accuracy of separations results and should be rejected.¹⁴ Indeed, while ACS has been unsuccessfully urging the Commission to change its position with respect to ISP-traffic for some time,¹⁵ ACS has also been engaging in “self-help” in this regard since March 1998. Specifically, the Commission recently determined that ACS has been improperly allocating the costs of ISP traffic to the interstate jurisdiction, in violation of the Commission’s plain directives on this issue, as a way of masking its excessive interstate access earnings.¹⁶

Plainly, ACS’ proposal on ISP-bound traffic is not offered as a principled solution to the current shortcomings of the Commissions separations methodology.¹⁷ ACS’ proposal here is

¹⁴ Glide Path Paper at 7.

¹⁵ See Jurisdictional Separation Reform and Referral to the Federal-State Joint Board, Ex Parte Notification of Anchorage Telephone Utility, CC Docket No. 80-286 (filed May 1, 1998) (notification of ex parte meeting in which ATU asserted that “internet traffic in Alaska should be classified as interstate for separations purposes”).

¹⁶ See General Communication, Inc. v. Alaska Communications Systems Holdings, Inc., 16 FCC Rcd 2834. Along these same lines, ACS also proposes that the Commission dispense with the current Dial Equipment Minute (“DEM”) based allocation factor in favor of an allocation factor based on switched minutes of use (“SMOU”). ACS states that switching technology has undergone dramatic changes, that digital switching has largely supplanted analog technology and that “[a]s a result, the Commission’s existing allocation factor, based on relative DEM, does not accurately capture the relative costs of digital circuit switches in each jurisdiction.” ACS argued this same point, unsuccessfully, in a recent formal complaint proceeding brought against ACS by GCI. In its Order ruling in favor of GCI, the Commission rejected ACS’ distinction between analog and digital switches and noted that ACS’ argument had been previously considered and rejected by the Joint Board in its proceeding to amend Part 67 of the Commission’s Rules. See id. at 2851-53 (citing Amendment of Part 67 of the Commission’s Rules and Establishment of a Joint Board, Order Inviting Comments, 2 FCC Rcd 3787, 3788 (¶ 7) (1987). See also Reply Comments of Fred Williamson and Associates, Inc. at 9 (noting that this change has “been debated and rejected numerous time in the last twenty years in CC Docket No. 80-286.”)

¹⁷ Indeed, the fact that another ILEC has stated that “there is simply no reason to undertake any DEM adjustment” based on ISP-bound traffic and that the “concerns are unwarranted” underscores the self-serving nature of ACS’ proposal. See Verizon Comments at 7-9.

simply an attempt by ACS to obtain the Commission's blessing for its ongoing, unprincipled departure from the Commission's rules.¹⁸

Though ACS states that “any changes to the jurisdictional separations rules should be made in such a way to prevent further increases in subscriber line charges,”¹⁹ plainly, ACS' proposals would, by changing the jurisdictional allocation procedures, result in a significant increase in either end-user charges or the Federal Universal Service Fund.²⁰ ACS puts the Commission and the Joint Board on notice to “stand ready to provide additional universal support if necessary to prevent additional increases to end-user rates.”²¹ Thus, ACS seeks to shift cost to the interstate jurisdiction so that these costs will be recovered not from any rates ACS charges for a given service, but from some externalized fund. While ACS decries that “the CLEC may design its rates so as falsely to appear [to] the end-user... to be less costly than the ILEC,”²² the CLEC has no option for moving its cost to funds. Rather, CLECs must set rates in a manner that, too, recovers their costs, and they must do so without a guaranteed return. ACS does not seek to compete based on its actual cost of providing services. Instead, ACS seeks a subsidy-assisted upper hand in competing with other carriers, by shifting costs first to the interstate jurisdiction and then have those costs recovered from a “universal service” fund.

¹⁸ Though ACS has previously been content to impose these costs on its IXC customers, ACS at least acknowledges that if the costs are shifted to the interstate jurisdiction, then an alternative means of recovery must be developed. See ACS Comments at 11.

¹⁹ ACS Comments at 3.

²⁰ See Fred Williamson and Associates, Inc. Reply Comments at 9.

²¹ ACS Comments at 4.

²² Id. at 8.

II. ACS PROVIDES NO BASIS TO ELIMINATE RATE REGULATION AND JURISDICTIONAL SEPARATIONS

ACS further proposes the elimination of rate regulation entirely, including jurisdictional separations requirements, for carriers facing “effective competition.”²³ In support of its proposal, ACS merely states that “as competition develops and market forces increasingly govern the pricing of telecommunications services, the jurisdictional process should be eliminated.”²⁴ ACS does not propose any standards or procedures for accomplishing such a task. Indeed, though this proposal would necessitate a determination that a carrier is faced with effective competition “for all regulated services,” ACS does not venture to specify how or on what basis such a determination would be made, suggesting only that it would meet any such test.²⁵

This unsupported assertion does not merit serious consideration. When the Joint Board identified as a possible “final step” in its Glide Path the elimination of cost-based regulation, it identified myriad questions that must be addressed even to consider such a proposal.²⁶ ACS did not address a single one.

Though ACS refers generally to “effective competition,” it does not address how compliance with such a standard may be determined at the outset and over time.²⁷ In this regard,

²³ Id. at 2, 9-10.

²⁴ Id. at 9.

²⁵ Id.

²⁶ Glide Path Paper at 25.

²⁷ ACS claims that having been granted pricing flexibility, it would meet any criteria for complete deregulation. This claim is wholly unsupported. To date, the Commission has permitted pricing flexibility only under certain circumstances. Though GCI disputed in a pending petition for reconsideration that ACS meets that standard, the Commission has never determined that the showing necessary for pricing flexibility would further justify complete

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it would first be necessary to identify the market or markets in which competition must be assessed.²⁸ Plainly, interstate access service would be among those services which must be subject to competition before any regulatory relief could be granted.²⁹ Yet, given ACS' own rate setting practices and the Commission's determination that interstate access services market "does not appear to be structured in a manner that allows competition to discipline rates,"³⁰ ACS' proposal for total deregulation cannot be taken seriously.

First, ACS has not reduced its overall interstate access charges in any meaningful way since at least 1996, during a time when, as ACS notes, interstate access charges have declined.³¹ Indeed, ACS did not make any adjustment to its local switching rate in its tariff filing to implement the Commission's MAG Order. Though ACS trumpets that "competition" has kept its rates below what it could otherwise charge, in fact, ACS uses ISP costs to inflate its interstate

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relief from rate regulation. Were this the case, then Bell South, Southwestern Bell Telephone, Verizon, Sprint and other LECs that have been granted pricing flexibility would also be eligible for immediate deregulation, according to ACS.

²⁸ Obviously, ACS' ability to earn a 32 percent rate of return on its access services as a regulated carrier is inconsistent with any notion that it faces effective competition in the access market.

²⁹ Glide Path Paper at 24 (proposing that the incumbent carrier would have to face effective competition "for all regulated services.")

³⁰ Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9936 (¶ 32) (rel. Apr. 27, 2001) (emphasis in original) ("CLEC Access Charge Reform Order").

³¹ See ACS Comments at n.10. Indeed, ACS has consistently and substantially exceeded the Commission's rate of return prescription in the switched traffic sensitive category of interstate access services since 1995.

access revenue requirement to mask its excessive earnings.³² Under any common understanding of competition, ACS' rates would be declining in a competitive environment. Of course, the Commission's finding in the CLEC Access Charge Reform Order demonstrates how ACS maintains what are actually above cost rates for interstate access – rates that are high enough to cover the costs of Internet providers as well as IXC. In that Order, the Commission explained: “once an end user decides to take from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes the bottleneck for IXCs wishing to complete calls to, or carry calls from, that end user.”³³ Thus, the Commission concluded “that it is necessary to constrain the extent to which CLECs can exercise their monopoly power and recover an excessive share of their costs from their IXC access customers – and, through them, the long distance market generally.”³⁴ It is without dispute that if CLEC access charge pricing abuses must be policed through regulation, ACS cannot be released from regulatory oversight in its provision of the same service. ACS has offered no support for any conclusion to the contrary. GCI notes that the same can be said of ACS in the local market, where it is currently seeking a significant increase in local rates.³⁵

³² See Investigation of Tariffs Filed by ACS of Anchorage, Inc., and the National Exchange Carrier Association, Order Designating Issues for Investigation, CC Docket No. 02-36, DA 02-371 (CPD rel. Feb. 15, 2002).

³³ CLEC Access Charge Reform Order, 16 FCC Rcd at 9935 (¶ 30).

³⁴ Id. at 9938 (¶ 39).

³⁵ See Investigation of the Local Exchange Revenue-Requirement, Depreciation, Cost-of-Service, Rate Design Studies, and Tariff Rate Revision Designated as TA429-120 Filed by ACS of Anchorage, Inc. d/b/a Alaska Communications Systems, ACS Local Service, and ACS, Regulatory Commission of Alaska Docket No. U-01-34.

III. CONCLUSION

In the Glide Path Paper, the Joint Board had identified a framework for discussion and review of existing separations rules and policies. ACS, however, has not furthered this discussion through its comments. Instead, ACS' Comments underscore that the Joint Board should not use jurisdictional separations to permit ILECs to shift real costs to non-competitive services as means of impeding future economic competition.

Respectfully submitted,

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Dated: March 8, 2002

CERTIFICATE OF SERVICE

I, Colleen A. Mulholland, hereby certify that a copy the foregoing Reply Comments of General Communication, Inc. was delivered to each of the following parties by first-class mail on March 8, 2002:

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